

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 867 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

BABUBHAI ALIAS MUSTAFA ABDUL KADAR QURESHI

Versus

STATE OF GUJARAT

Appearance:

MR HM PRACHCHHAK for Petitioner

MR HH PATEL, APP, for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 02/12/1999

ORAL JUDGEMENT

1. The petitioner is an externee who came to be externed by an order passed by Deputy Commissioner of Police, North Zone, Surat city, Surat, on 19th July 1999 in exercise of powers u/s 56 of the Bombay Police Act [hereinafter referred to as 'the Act' for short]. Before passing the above order, the externing authority issued a notice on 20th April 1998 as required u/s 59 of the Act to the proposed externee, the petitioner. In the

allegations made in the notice, it was stated that the petitioner was involved in offences punishable u/s 323, 324 of IPC and has been booked by Mahidharpura police station being Cr.R. No. I - 455/97, chargesheet is filed and the case is pending in the court. The externing authority also considered the statements of three witnesses, whose identity has been kept anonymous relating to the incidents dated March 30, 1998, March 31, 1998 and April 3, 1998. It is also recorded that proceedings u/s 107 of the Code of Criminal Procedure were initiated vide Chapter Case No. 232/97 and still the petitioner has involved himself in the incidents stated by the anonymous witnesses.

2. In the final externment order dated 19th July 1999, the authority considered that the petitioner was booked by Mahidharpura police station vide Cr.R. No. I 455/97 for offences punishable u/s 323, 324 IPC and the case was disposed of and the petitioner was acquitted as the complainant and the witnesses turned hostile. In the later portion of the externment order, the externing authority observed that, considering the material before him which include, depositions of the witnesses, examined by the proposed externee, he is satisfied that all the allegations made in the show cause notice u/s 59 of the Act were established and therefore, passed the externment order.

3. The externment order was carried in appeal u/s 60 of the Bombay Police Act before the Government. The grounds raised in the appeal were as under :-

[a] Only one offence is registered against the externee relating to offences punishable u/s 323, 324 IPC.

[b] It is held by the externing authority that the externee is involved in offences punishable under Chapter 16 & 17 of IPC, whereas no offence punishable under Chapter 17 is disclosed.

[c] The externment order is belated as it is passed after almost one year and three months from the date of issuance of notice.

[d] The externing authority has not considered and recorded a subjective satisfaction regarding the incidents narrated by the three anonymous witnesses from the view point that the incidents may have been witnessed by persons other than the victims / anonymous witnesses.

3. The appellate authority dealt with grounds cursorily. The authority considered that, apart from one registered offence and externee was involved in three unregistered offences also. It also observed that steps were taken under section 107 of the Cr.P.C. for preventing externee from pursuing his anti social activities, but in vain. As regards delay, the authority observed that the externing authority had given ample opportunity to the proposed externee in the externment proceedings and therefore, the delay. If the authority had not granted time, probably it would have been argued that the proposed externee was not given opportunity of defending himself. The appellate authority ultimately turned down the appeal and confirmed the order of externment.

4. The petitioner has approached this Court with this petition under Article 226 of the Constitution of India, challenging the notice, order of externment and the order of the appellate authority on various grounds.

5. Mr.H.M.Parchchak, learned advocate appearing for the petitioner submitted that the externing authority has taken into consideration the offence for which the petitioner was acquitted while passing the order of externment. This, according to Mr.Parchchak, was not permissible in law, for the externing authority. The externing authority has considered extraneous factor and therefore, there is non-application of mind. As regards the delay, Mr.Parchchak submitted that the notice was issued on 20th April 1998 and the externment order came to be passed on 19th July 1999 i.e. nearly after 15 months and therefore, the order is bad. He submitted that, during this entire period, there is no offence registered against the petitioner, nor there is any allegation of his involvement in any unregistered offence. He, therefore, urged that the petition may be allowed.

6. Mr.H.H.Patel, learned APP, appearing for the respondents has opposed this petition vehemently. He has, in his prolonged arguments, taken this Court through the notice, the order of externment and the order of the appellate authority, besides the relevant provisions of the Bombay Police Act. He submitted that the externing authority was subjectively satisfied about the need for externing the petitioner and this Court, therefore, may not interfere with the order in exercise of powers under Article 226 of the Constitution of India. He submitted that, apart from the registered offence, externee was

involved in unregistered offence also. He was found to be acting in a high handed manner and less drastic remedies had paid no results. The externing authority was therefore left with no alternative, but to pass the order of externment, in public interest. He placed reliance in the case of *Abedin Rasul Bombaywala v/s Commissioner of Police, Surat & ors.* 1986 GLH 1986, submitted that the delay in passing the order may not affect the merit of the present case in view of the decision in that case and therefore, urged that the petition may be dismissed.

7. Having regard to the rival side contentions, the first and foremost ground that can be said to have vitiated the order of externment is that, although the externing authority was conscious of the fact that the proposed externee was acquitted in the criminal case booked against him vide Mahidharpura police station Cr.R. No. I - 455/97 u/s 323, 324 of IPC, it has taken into consideration the said case while passing the order of externment. This is clearly reflected from the construction of para-1 of the externment order, wherein it is stated that the petitioner is involved in offence punishable under Chapter 16 and 17 of the IPC, the details of which are given and then, it has stated the details of the said registered offences in a tabular form and in the last column of that table, the authority has stated that the complainant and the witnesses in that case had turned hostile. In the later portion, the authority has observed that, considering the material before it, it is satisfied that all the allegations made in the showcause notice are established. The allegations in the showcause notice include the offence registered vide Mahidharpura police station Cr.R. No. I 455/97. This reflects that the externing authority took into consideration the offence for which the petitioner was acquitted, which it could not have done.

8. Another aspect that requires to be considered is that the notice came to be issued on April 20, 1998 and the externment order came to be passed on July 19, 1999 i.e. almost on completion of period of 15 months from the date of notice. This has been a major ground of attack by the petitioner. An attempt is made by the respondents to show that the delay was caused as the adjournments were given to the proposed externee during the externment proceedings, but no details are given. The appellate authority in its order and the externing authority in the affidavit in reply before this Court contended by stating that the petitioner was given opportunity to defend himself and after following due

procedure of law, the order of externment was passed. The delay caused in passing the order of externment is due to noncooperation on part of the petitioner. Barring this bald assertion in the affidavit, the externing authority has not come with any details as to how the externment proceedings proceeded, how many adjournments were sought by the proposed externee and on what grounds and how many of such adjournments were granted by the externing authority. All these factors are not disclosed in the affidavit in the reply. It is for the authority to explain such a long delay of about 15 months caused in passing the order.

9. Another factor that requires consideration is that, as argued on behalf of the petitioner and not controverted by the otherside, the petitioner is not involved in any offences between April 1998 and July 1999, either registered or unregistered. The delay, therefore, caused in passing the order would have a greater adverse impact on the order of externment. This aspect is not at all considered by the externing authority.

10. Mr. Patel, learned APP pressed into service the decision in the case of Abedin Rasul Bombaywala v/s Commissioner of Police, Surat & ors. reported in 1986 GLR 1986 in support of his argument that delay may not affect the externment order. However, if the judgement is considered, the Division Bench observed that, in that case, the externing authority had explained the delay in affidavit in reply. The affidavit in reply carried detailed averments regarding the adjournments granted mostly on the request of the petitioner. In the instant case, no such details are forthcoming from the externing authority and only a bald assertion that the delay was caused because the opportunity was given to the proposed externee for defending his case, cannot be of any virtue to the respondents. In this view of the matter, the argument advanced by learned APP cannot be accepted, resultantly the order of externment suffers from another vice of delay which would again render it vitiated.

11. Reliance can be placed on the decision in the case of Suresh Haribhai Marathi v/s Deputy Commissioner of Police, Surat reported in 1991[1] GLR 296, where it was observed that, when an order of externment is passed on several grounds, some of which are irrelevant, the Court cannot decide which ground weighed with the externing authority and it cannot substitute its own decision that of the authority and so, the order of externment must be quashed. When in the instant case,

the externment order came to be passed by placing reliance on a criminal case in which the externnee was acquitted before the order was passed and therefore, that ground became irrelevant and in view of the above decision, the externment order deserves to be quashed.

12. The externment order impugned in this petition, therefore, is found to be suffering from two major defects, namely, [i] consideration of irrelevant factor vitiating the order and; [ii] delay in passing the order. The petition, therefore, deserves to be allowed by quashing and setting aside the order of externment and the order in appeal.

13. The petition is, therefore, allowed. The impugned order of externment dated 19th July 1999 and the order in appeal dated 6/9/99 are quashed and set aside. Rule is made absolute accordingly with no orders as to

[A.L.DAVE, J.]

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